

LIMITING EXECUTIVE AUTHORITY IN IMMIGRATION

EXECUTIVE SUMMARY

Unless Congress places new limits on a president's authority under section 212(f) to restrict legal immigration and suspend the entry of immigrants and temporary visa holders, it should expect a future president to use the power in a way similar to Donald Trump, concludes a National Foundation for American Policy (NFAP) analysis of executive authority and immigration. An NFAP review finds as president Donald Trump used section 212(f) 30 times, far more often and in much broader and more restrictive ways than any previous president since the law was established in 1952.

Under section 212(f) of the Immigration and Nationality, codified as [8 USC section 1182\(f\)](#), the president of the United States has the authority to prevent the entry into the United States of any foreign national he decides is "detrimental to the interests of the United States." Critics viewed Trump's use of 212(f) authority to be unwise and unlawful, and believe the power needs to be restricted and reformed.

Shortly after coming into office, Donald Trump used section 212(f) to prevent the entry of foreign nationals from primarily Muslim countries. Attorneys and civil rights organizations challenged the action in court but the Supreme Court ruled in favor of the Trump administration after the third iteration of the travel ban.

Courts have provided only a limited check on a president's authority to invoke section 212(f) to restrict legal entry into the United States.

"The best option would be to just repeal it entirely," said Ilya Somin, a George Mason University law professor. "As Trump has shown, the power granted by the statute is ripe for egregious abuse. Trump has used it to adopt [multiple travel bans with no meaningful justification](#), and . . . has used it to suspend nearly all entry into the United States by migrants and refugees seeking permanent residence—a massive power grab that has made the U.S. more completely closed to migrants seeking to make this country their permanent home than at any other time in many decades, perhaps in our entire history."

Donald Trump and his adviser Stephen Miller showed section 212(f) could be used to block the entry of all (or nearly all) immigrants and temporary visa holders from coming to the United States. That is essentially what the Trump administration did with the proclamations issued in April and June 2020, as well as the Muslim travel ban and the health insurance proclamation. The Supreme Court placed only limited restrictions on the 212(f) power in the Muslim travel ban case. If the NO BAN Act ([H.R. 1333](#)), authored by Rep. Judy Chu (D-CA), became law, it would limit a future president's use of 212(f). Another option is to draft regulations that would act as a check on the unbridled use of the authority to block legal immigrants and long-term visa holders. If the section 212(f) authority remains unchanged, and Donald Trump or someone with similar views on immigration occupies the White House in 2024 or

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later, section 212(f) will be used again and supporters of immigration will lament that nothing was done to limit its use.

WHAT IS A PRESIDENT'S AUTHORITY UNDER 212(F)?

Under section 212(f) of the Immigration and Nationality, codified as [8 USC section 1182\(f\)](#), the president of the United States has the authority to prevent the entry into the United States of any foreign national he decides is “detrimental to the interests of the United States.” The full text reads: “Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”¹

HOW DID DONALD TRUMP USE 212(F)?

Donald Trump used the previously little-used authority in 212(f) of the Immigration and Nationality Act more than any previous president. Critics viewed his use of 212(f) authority as unwise and unlawful, and signal the power needs to be restricted and reformed.

A National Foundation for American Policy analysis finds as president Donald Trump used 212(f) 30 times, far more often and in much broader and more restrictive ways than any previous president since the law was established in 1952. Only five of the 30 proclamations were health-related Covid-19 restriction. Two other proclamations used Covid-19-related unemployment as a pretext to suspend the entry of nearly all immigrants and temporary visa holders who would enter the United States.²

“It appears that presidents did not employ § 212(f) to impose entry restrictions until the Reagan Administration,” according to the Congressional Research Service. “On at least two earlier occasions—in 1953 and 1979—Presidents invoked a different provision, INA § 215(a), to authorize Department of State regulations restricting alien entry. Since 1981, every President has invoked § 212(f) at least once . . . But invocations have become more frequent in recent administrations, particularly during the Trump administration.”³

No previous president used 212(f) to enact broad immigration restrictions affecting hundreds of thousands of people a year. The Obama administration used the authority 19 times, but nearly all were to enact narrow sanctions based on human rights or targeted foreign policy sanctions. George W. Bush used the authority 6 times and Bill Clinton

¹ [8 USC Section 1182\(f\)](#).

² Two proclamations issued as technical corrections are not included in the count of 30 proclamations.

³ Presidential Actions to Exclude Aliens Under INA § 212(f), Congressional Research Service, May 4, 2020.

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used it 12 times, also for narrow human rights or foreign policy sanctions. George H.W. Bush used the authority one time but in a broader way to address Haitian refugees at sea. The Reagan administration used 212(f) five times, two times for targeted foreign policy purposes to target the Sandinista government in Nicaragua and the Noriega/Solis Palma government in Panama. The other three times were to address the Cuban refugee crisis.⁴

THE “MUSLIM TRAVEL BAN”

Shortly after coming into office, Donald Trump used section 212(f) to prevent the entry of foreign nationals from primarily Muslim countries. Attorneys and civil rights organizations challenged the action in court but after the third iteration of the travel ban the Supreme Court ruled in favor of the Trump administration.

“In *Trump v. Hawaii*, where the Supreme Court rejected legal challenges to Proclamation 9,645 by a five-to-four vote, the Court held that the breadth of the restrictions on nationals of seven countries contained in the third iteration of the ‘Travel Ban’ did not exceed the President’s authority under § 212(f),” according to a Congressional Research Service summary. “The majority stated that § 212(f) ‘exudes deference to the President’ and grants him extremely broad power to impose entry restrictions. The Court reasoned that § 212(f) is a ‘comprehensive delegation’ that gives the President discretion over every detail of the entry restrictions he sets under it, including ‘when to suspend entry,’ ‘whose entry to suspend,’ ‘for how long,’ and ‘on what conditions.’”⁵

“In *Trump v. Hawaii* (2018), the travel ban case, Chief Justice John Roberts’ majority opinion largely endorsed the Trump administration’s very broad view of section 212(f),” said Ilya Somin, a law professor at George Mason University. “The Court rejected the argument the discretion granted by section 212(f) was limited by later enacted laws forbidding national discrimination in the issuance of visas, claiming that visas are distinct from the right to enter the United States.”⁶

“The Court also rejected the argument that Trump’s policy violated the First Amendment ban on religious discrimination because it deliberately targeted residents of Muslim-majority nations in order to fulfill Trump’s notorious campaign promise to institute a ‘Muslim ban,’” said Somin. “They ruled against the plaintiffs on that issue primarily because the majority justices believe that the Court should grant special deference to the president on immigration law issues that would not apply in other contexts. However, it is important to note that the Court did *not* address the argument that the broad interpretation of section 212(f) violates the nondelegation doctrine. That issue remains open, perhaps to be decided in a future case.

⁴ Ibid.

⁵ Ibid.

⁶ Stuart Anderson, “How To Limit a President’s Power Over Immigration,” *Forbes*, June 8, 2020.

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“The Court’s ruling was badly misguided on both the statutory question and the constitutional one. On the former, the distinction between visas and entry strikes me as specious, given that the whole point of getting a visa is to obtain the right to enter the United States. A visa that does not grant the holder a right to entry is basically worthless, except perhaps as toilet paper.

“On the constitutional issue, the Court [swept under the rug the overwhelming evidence that the travel ban order served no legitimate national security purpose, and that the true motive was religious discrimination](#). The national security justification offered by the administration was [transparently bogus, bordering on outright fraud](#). The idea that such judicial abdication is justified because courts must give special deference to the executive on immigration policy has considerable basis in precedent. But it is [at odds with the text and original meaning of the Constitution and has its roots in the racism and xenophobia of the same era that gave us *Plessy v. Ferguson*](#). Hopefully, a future Court will revisit these issues and correct at least some of the egregious errors the majority made in *Trump v. Hawaii*. In the meantime, nothing in that ruling prevents the court from striking down section 212(f) or narrowing its interpretation of it, based on the nondelegation doctrine, as described above.”⁷

HEALTH INSURANCE MANDATE AND APRIL AND JUNE 2020 PROCLAMATIONS

On October 4, 2019, Donald Trump used section 212(f) to issue a [proclamation](#) to bar immigrants from entering the country if they could not prove they had adequate health insurance. The proclamation illustrated the dangers of the 212(f) authority in the hands of a president opposed to immigration. Whether it is a good idea to require immigrants to have health insurance is irrelevant to the issue of whether the president can impose conditions on entry that Congress chose not to require. For example, according to the American Psychological Association, individuals who are tall earn more money than those who are short.⁸ Would it be permissible for a president to use section 212(f) to bar immigrants who are not 6 feet, 6 inches or taller?

“The [health insurance] proclamation excludes from the United States new lawful immigrants who cannot show the ability to purchase unsubsidized commercial health insurance within 30 days of entry, unless exceptions apply,” said William Stock, a founding member of Klasko Immigration Law Partners. “It will prevent otherwise eligible immigrants coming in from abroad from being issued visas to enter the U.S. if they lack the financial ability to purchase unsubsidized health insurance. That means that prospective immigrants potentially could be barred from the United States unless they can find a way to purchase health insurance outside of the Affordable Care Act (ACA) exchanges.”⁹

⁷ Ibid.

⁸ <https://www.apa.org/monitor/julaug04/standing>.

⁹ Stuart Anderson, “Health Insurance Mandate: The Next Hammer to Fall on Immigrants,” *Forbes*, February 25, 2020.

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In an opinion issued on May 4, 2020, in [Doe #1 v. Trump](#), a panel of district court judges in the U.S. Court of Appeals for the Ninth Circuit “denied the government’s motion for a stay pending appeal of the district court’s preliminary injunction enjoining Presidential Proclamation No. 9945.”

The panel ruled that while the president satisfied certain prerequisite in *Hawaii*, the health insurance ban differed from that case. “By contrast, the Proclamation here deals with a purely domestic economic problem: uncompensated healthcare costs in the United States,” according to the panel. “We reject the government’s argument that the Proclamation implicates the President’s foreign affairs powers simply because the Proclamation affects immigrants.”¹⁰

However, [an opinion](#) filed on December 31, 2020, after an appeal in the Ninth Circuit, overturned the order issued on May 4, 2020, and, in effect, appears to place almost no practical limits on a president’s authority to block the entry of any foreign national for almost any reason. The Trump administration showed no interest in the problem of the uninsured, except using the health insurance proclamation as a new method to block immigrants from the United States. Yet the opinion filed on December 31, 2020, assumes health insurance for immigrants was a matter of serious concern for the president and his administration.

Most important, the Ninth Circuit on December 31, 2020, rejected the principle that matters of purely domestic concern could not be covered by a 212(f) proclamation. “Contrary to what the district court concluded, it makes no difference whether the additional entry restrictions are imposed under § 212(f) based on assertedly domestic policy concerns,” according to the circuit court opinion. “The district court’s demand for additional congressional guidance when ‘domestic’ concerns are at issue lacks a principled basis and is unworkable: because all additional restrictions under § 212(f) on who may *enter* the United States are ultimately based on the ‘detrimental’ impact of those aliens’ presence, *see* 8 U.S.C. § 1182(f), all such restrictions may be characterized as reflecting “domestic” policy concerns to a greater or lesser degree. . . . The district court identified no coherent basis for insisting that, in delegating authority to impose additional restrictions on who may immigrate into this country from another nation, Congress must provide greater guidance when the asserted detrimental impact of such aliens is based on “domestic” policy concerns.”¹¹

On April 22, 2020, Donald Trump used section 212(f) to issue a [proclamation](#) that suspended the entry of all categories of immigrants to the United States with the exception of the spouses and children of U.S. citizens. On

¹⁰ *John Doe #1 v. Donald Trump*, U.S. Court of Appeals for the Ninth Circuit, order filed May 4, 2020, No. 19-36020, D.C. No. 3:19-cv-01743-SI.

¹¹ *John Doe #1 v. Donald Trump*, opinion, U.S. Court of Appeals for the Ninth Circuit, filed December 31, 2020, No. 19-36020, D.C. No. 3:19-cv-1743-SI.

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June 22, 2020, Trump used his authority again to issue another [proclamation](#) this one suspending the entry of H-1B, L-1 and other temporary visa holders. Litigation [stopped the June 2020 proclamation for many employers](#) but had only limited success against the April 2020 proclamation. Lawsuits to stop the April 22, 2020 proclamation had less success.

On September 11, 2020, a hearing was held in the U.S. District Court for the Northern District of California on the proclamation issued on June 20, 2020. Paul Hughes of McDermott Will & Emery, counsel for the plaintiffs, said that if Congress delegated *unlimited* authority to the president under section 212(f) of the Immigration and Nationality Act (8 U.S.C. § 1182(f)), the law is unconstitutional as an [unlawful delegation of authority](#) by Congress. If the authority is not unlimited, then there are limits to the president's authority based on rational standards, the Supreme Court's decision in [Trump v. Hawaii](#) and the Ninth Circuit decision in [Doe #1 v. Trump](#).¹² This was before the 2-1 opinion on December 31, 2020, in the Ninth Circuit that overturned the district court's decision.

Judge White ruled in favor of the plaintiffs. "Under this strict separation of powers, Congress has created a complex, highly reticulated set of immigration laws and regulations," writes Judge White in his opinion. "Congress has legislated in the immigration arena since 1882."

Congress also delegated authority to the president to suspend or restrict aliens using 212(f). "However, the Supreme Court also noted that calculus changes where the authority exercised by the President is outside the suspension of entry of aliens based on foreign policy interests," writes Judge White. "While the discretion to suspend entry of aliens into the United States is broad, 'the substantive scope of this power is not limitless.' [*Doe #1 v. Trump*]. In the Muslim Proclamation, the President 'acted within the traditional spheres authorized by § 1182(f): in the context of international affairs and national security, and working in tandem with the congressional goals of vetting individuals from countries identified as threats through an agency review.'"¹³

Judge White wrote, "[T]he Proclamation here deals with a purely domestic economic issue – the loss of employment during a national pandemic. In 'domestic economic matters, the national security and foreign affairs justification for policy implementations disappear, and the normal policymaking channels remain the default rules of the game.' This Court rejects the position that the Proclamation implicates the President's foreign affairs powers simply because it affects immigration."

An amicus curiae brief from law professors concluded that past presidents "had issued such Proclamations with the basic understanding that 'exercises of authority under § 1182(f) must connect to the United States' relations with

¹² Stuart Anderson, "Judge Rules Against Trump's H-1B Visa Ban: President is Not a Monarch," *Forbes*, October 2, 2020.

¹³ The judge cited *Trump v. Hawaii* (or *Hawaii III*).

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foreign powers.’ As the Court examines this Proclamation in the immigration context aimed to address purely domestic considerations, the amicus suggests that ‘[g]iven this lack of pedigree on past practice, this Court should scale back deference that it affords the current proclamation.’”

Before the 2-1 opinion on December 31, 2020, in the Ninth Circuit, Judge White cited *Doe #1*, which blocked the proclamation banning the entry of immigrants who lacked health insurance, noting it was the first proclamation “based solely on a change in domestic policy by invoking the delegation of powers in immigration to the President.”¹⁴ Judge White wrote, “In this wholly domestic context, the delegation by Congress is without any intelligible principle and thus fails under the nondelegation doctrine.’ This Court agrees. Congress’ delegation of authority in the immigration context under section 1182(f) does not afford the President unbridled authority to set domestic policy regarding employment of nonimmigrant foreigners.”

“In addition to finding that executive power is reviewable and somewhat curtailed in the context of a purely domestic economic issue, the Court also finds that Congress did not delegate authority to eviscerate portions of the statute in which the Congressional delegation of power was made. Logic would so dictate,” wrote Judge White.

“The Proclamation at issue here nullifies significant portions of the remainder of the INA [Immigration and Nationality Act], by declaring invalid statutorily-established visa categories in their entirety for the remainder of this calendar year and indefinitely beyond that deadline,” according to the judge. “Here, rather than supplementing the INA’s existing provisions, the Proclamation eviscerates whole categories of legislatively-created visa categories. Until, at a minimum, the end of the year, the Proclamation simply eliminates H-1B, H-2B, L-1, and J-1 visas and nullifies the statutes creating those visa categories. The Proclamation, by its explicit terms, rewrites the carefully delineated balance between protecting American workers and the need of American businesses to staff their operations with skilled, specialized, and temporary workers.”

Judge White also noted there was a chance the ban on the entry of visa holders would continue indefinitely and, in fact, the Trump administration extended the ban until March 31, 2021, though it could have chosen any date: “The indeterminate end date of the Proclamation is also legally suspect. Although by its terms, the effective termination date of the Proclamation is December 31, 2020, it provides that the end date may be extended indefinitely at the discretion of the President and his appointees.”

¹⁴ ¹⁴ Stuart Anderson, “Judge Rules Against Trump’s H-1B Visa Ban: President is Not a Monarch.”

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“There must be some measure of constraint on Presidential authority in the domestic sphere in order not to render the executive an entirely monarchical power in the immigration context, an area within clear legislative prerogative,” according to Judge White.¹⁵

Despite Judge White’s opinion, it is not clear the courts will be a sufficient bulwark against executive authority and the use of section 212(f).

REFORM THROUGH LEGISLATION

On July 22, 2020, the House of Representatives passed the [NO BAN Act \(H.R. 2214\)](#) by a vote of 233-183. The vote, almost entirely along party lines, was a response to the Muslim travel ban issued by Donald Trump and upheld by the Supreme Court in the *Hawaii* case. The bill was not considered in the Senate.¹⁶ However, it is also contained in the U.S. Citizenship Act, the immigration legislation developed by the Biden administration and introduced in Congress in February 2021, and was also introduced as a standalone bill in 2021. [H.R. 1333](#), the version of the NO BAN Act introduced in 2021, differs in only minor respects from the bill that passed Congress in 2020.

The bill states “if the Secretary of State, in consultation with the Secretary of Homeland Security, determines, based on specific and credible facts, that the entry of any aliens or any class of aliens into the United States would undermine the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability, the President may temporarily—

“(A) suspend the entry of such aliens or class of aliens as immigrants or nonimmigrants; or

“(B) impose any restrictions on the entry of such aliens that the President deems appropriate.”

The bill places limitations on the use of this power. “In carrying out paragraph (1), the President, the Secretary of State, and the Secretary of Homeland Security shall—

“(A) only issue a suspension or restriction when required to address specific acts implicating a compelling government interest in a factor identified in paragraph (1);

“(B) narrowly tailor the suspension or restriction, using the least restrictive means, to achieve such compelling government interest;

“(C) specify the duration of the suspension or restriction;

“(D) consider waivers to any class-based restriction or suspension and apply a rebuttable presumption in favor of granting family-based and humanitarian waivers; and

¹⁵ Ibid.

¹⁶ <https://www.congress.gov/committee-print/116th-congress/house-committee-print/40154>.

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“(E) comply with all provisions of this Act.”

The bill requires the Secretary of State and the Secretary of Homeland Security to “consult Congress and provide Congress with specific evidence supporting the need for the suspension or restriction and its proposed duration.”

The bill allows “an individual or entity who is present in the United States and has been harmed by a violation of this subsection may file an action in an appropriate district court of the United States to seek declaratory or injunctive relief” and that nothing prevents a class action lawsuit.

Ilya Somin believes the NO BAN Act would be a positive development if it became law. “The bill would make clear that the nondiscrimination provision the majority [of the Supreme Court] refused to apply in the travel ban cases applies to ‘entry’ as well as the issuance of immigrant visas,” said Somin. “That fixes the problem the Court created with its dubious distinction between the two. It also makes clear the restriction applies to nonimmigrant [temporary] visas as well as those for immigrants, and explicitly bans discrimination on the basis of religion when it comes to both visas and entry. All of these points are steps in the right direction – though they are necessary only because the Court erred so badly in *Trump v. Hawaii*.”¹⁷

Somin wishes the legislation went farther. “The best option would be to just repeal it entirely. As Trump has shown, the power granted by the statute is ripe for egregious abuse,” he said. “Trump has used it to adopt [multiple travel bans with no meaningful justification](#), and now has used it to suspend nearly all entry into the United States by migrants and refugees seeking permanent residence – a massive power grab that has made the U.S. more completely closed to migrants seeking to make this country their permanent home than at any other time in many decades, perhaps in our entire history. Never previously has the range of people eligible to enter the U.S. in search of permanent residence been defined so narrowly. There are already other laws that address genuine threats to national security, such as those allowing the government to apprehend criminals, terrorists and the like.”

“Congress could replace section 212(f) with more limited authority allowing the president to bar entry only for specified reasons, such as a threat to national security or participation in organized crime or the like. When the president uses the authority to exclude, they could also require the executive to provide substantial evidence indicating that the persons in question really do pose a threat of the sort specified in the revised statute.

“Congress could direct courts to take a nondeferential approach to such issues. Instead of just taking the president’s word for it, the administration can be required to prove its case by at least a preponderance of evidence – the normal

¹⁷ Stuart Anderson, “How To Limit a President’s Power Over Immigration.”

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standard of proof for civil litigation. Higher standards might be required in cases where the president bars very large numbers of people or imposes exclusions that last for a long period of time.

“Finally, if Congress thinks the president needs the power granted by section 212(f) to be able to take quick action in the midst of a sudden crisis, it could impose a sunset clause on exclusions imposed by the executive under section 212. After, say, 60 days, such restrictions would automatically expire unless Congress affirmatively passes a bill to extend them. This would give the president flexibility to deal with emergencies, but also prevent him from using section 212(f) to enact permanent immigration restrictions, as Trump has done with his travel bans.”¹⁸

REFORM BY REGULATION

If Congress fails to pass the NO BAN Act or another bill that would place limits on a president’s authority under 212(f), the Biden administration should consider drafting regulations to guide and constrain the use of 212(f) consistent with the nondelegation doctrine. The purpose would be to ensure any future president cannot use the authority in a reckless manner to, in effect, nullify laws passed by Congress on legal immigration. The regulation could place limits on the circumstances section 212(f) could be used and the evidence required to invoke it.

A NEW POTENTIAL RESTRICTION ON IMMIGRATION

Along with many positive changes for businesses and employment-based immigrants, the U.S. Citizenship Act contains a provision that raises concerns. The bill would allow the Secretary of Homeland Security, in consultation with the Secretary of Labor, to “establish, by regulation, a procedure for temporarily limiting” employment-based immigrants from entering the U.S. or adjusting status inside the United States “in geographic areas or labor market sectors that are experiencing high levels of unemployment.”¹⁹

“This section of the bill would allow a future president who did not believe in immigration to direct the Department of Homeland Security and Department of Labor to bar employment-based immigration in large parts of the economy,” said William Stock of Klasko Immigration Law Partners. “It would allow those agencies to ban immigration based on broad unemployment trends unrelated to labor market shortages in specific industries or for particular skill sets. For the past four years, we have seen that delegations of authority meant to allow for responses to emergencies, like the travel ban authority, can be misused to bar immigration broadly unless the statute provides strict guidelines as to how that authority should be exercised.”²⁰

¹⁸ Ibid.

¹⁹ Stuart Anderson, “New Bill Has Many Good But Two Bad Measures For Employment Immigrants,” *Forbes*, February 19, 2021.

²⁰ Ibid.

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The terms “high levels of unemployment” and “temporarily” are not defined, making it possible a future president could block all potential employment-based immigrants for 8 years.²¹ Another section of the bill includes the NO BAN Act and takes the opposite approach.

CONCLUSION

Donald Trump and his adviser Stephen Miller showed section 212(f) could be used to block the entry of all (or nearly all) immigrants and temporary visa holders from coming to the United States. That is essentially what the Trump administration did with the proclamations issued in April and June 2020, as well as the Muslim travel ban and the health insurance proclamation. The Supreme Court placed only limited restrictions on the 212(f) power in the Muslim travel ban case. If the NO BAN Act became law, it would limit a future president’s use of 212(f). Absent that, another option is to draft regulations that would act as a check on the unbridled use of the authority to block legal immigrants and long-term visa holders. If the 212(f) authority remains unchanged, and Donald Trump or someone with similar views on immigration occupies the White House in 2024 or later, section 212(f) will be used again and supporters of immigration are likely to lament that nothing was done to limit the use of the power.

²¹ Ibid.

APPENDIX

Excerpt of Text of NO BAN Act (H.R. 1333)

Section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)) is amended to read as follows:

“(f) AUTHORITY TO SUSPEND OR RESTRICT THE ENTRY OF A CLASS OF ALIENS.—

“(1) IN GENERAL.—Subject to paragraph (2), if the Secretary of State, in consultation with the Secretary of Homeland Security, determines, based on specific and credible facts, that the entry of any aliens or any class of aliens into the United States would undermine the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability, the President may temporarily—

“(A) suspend the entry of such aliens or class of aliens as immigrants or nonimmigrants; or

“(B) impose any restrictions on the entry of such aliens that the President deems appropriate.

“(2) LIMITATIONS.—In carrying out paragraph (1), the President, the Secretary of State, and the Secretary of Homeland Security shall—

“(A) only issue a suspension or restriction when required to address specific acts implicating a compelling government interest in a factor identified in paragraph (1);

“(B) narrowly tailor the suspension or restriction, using the least restrictive means, to achieve such compelling government interest;

“(C) specify the duration of the suspension or restriction;

“(D) consider waivers to any class-based restriction or suspension and apply a rebuttable presumption in favor of granting family-based and humanitarian waivers; and

“(E) comply with all provisions of this Act.

“(3) CONGRESSIONAL NOTIFICATION.—

“(A) IN GENERAL.—Prior to the President exercising the authority under paragraph (1), the Secretary of State and the Secretary of Homeland Security shall consult Congress and provide Congress with specific evidence supporting the need for the suspension or restriction and its proposed duration.

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“(B) BRIEFING AND REPORT.—Not later than 48 hours after the President exercises the authority under paragraph (1), the Secretary of State and the Secretary of Homeland Security shall provide a briefing and submit a written report to Congress that describes—

“(i) the action taken pursuant to paragraph (1) and the specified objective of such action;

“(ii) the estimated number of individuals who will be impacted by such action;

“(iii) the constitutional and legislative authority under which such action took place; and

“(iv) the circumstances necessitating such action, including how such action complies with paragraph (2), as well as any intelligence informing such actions.

“(C) TERMINATION.—If the briefing and report described in subparagraph (B) are not provided to Congress during the 48 hours that begin when the President exercises the authority under paragraph (1), the suspension or restriction shall immediately terminate absent intervening congressional action.

“(D) CONGRESSIONAL COMMITTEES.—The term ‘Congress’, as used in this paragraph, refers to the Select Committee on Intelligence of the Senate, the Committee on Foreign Relations of the Senate, the Committee on the Judiciary of the Senate, the Committee on Homeland Security and Governmental Affairs of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on Foreign Affairs of the House of Representatives, the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security of the House of Representatives.

“(4) PUBLICATION.—The Secretary of State and the Secretary of Homeland Security shall publicly announce and publish an unclassified version of the report described in paragraph (3)(B) in the Federal Register.

“(5) JUDICIAL REVIEW.—

“(A) IN GENERAL.—Notwithstanding any other provision of law, an individual or entity who is present in the United States and has been harmed by a violation of this subsection may file an action in an appropriate district court of the United States to seek declaratory or injunctive relief.

“(B) CLASS ACTION.—Nothing in this Act may be construed to preclude an action filed pursuant to subparagraph (A) from proceeding

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as a class action.

“(6) TREATMENT OF COMMERCIAL AIRLINES.—

Whenever the Secretary of Homeland Security finds that a commercial airline has failed to comply with regulations of the Secretary of Homeland Security relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Secretary of Homeland Security may suspend the entry of some or all aliens transported to the United States by such airline.

“(7) RULE OF CONSTRUCTION.—Nothing in this section may be construed as authorizing the President, the Secretary of State, or the Secretary of Homeland Security to act in a manner inconsistent with the policy decisions expressed in the immigration laws.”

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) nonprofit, nonpartisan public policy research organization based in Arlington, Virginia, focusing on trade, immigration and related issues. Advisory Board members include Columbia University economist Jagdish Bhagwati, Cornell Law School professor Stephen W. Yale-Loehr, Ohio University economist Richard Vedder and former INS Commissioner James Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.
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